A

Keruntum Sdn Bhd v The Director of Forests & Ors

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-22–10 OF 2014(Q)
ARIFIN ZAKARIA CHIEF JUSTICE, HASAN LAH, ZAINUN ALI, ABU SAMAH NORDIN AND AZIAH ALI FCJJ
15 MARCH 2017

C

Civil Procedure — No case to answer — Conclusion of plaintiff's case — Whether plaintiff at close of case failed to prove Minister of Resource Planning/Chief Minister committed tort of misfeasance in public office by cancelling plaintiff's timber licence on political grounds — Whether defendants D *had no case to answer — Whether Minister no duty to testify to refute plaintiff's allegations — Whether no adverse inference could be invoked against defendants for not calling Minister to testify — Whether plaintiff's claim in tort time-barred under Public Authorities Protection Act 1948 — Whether plaintiff could not maintain contractual claim for revocation of licence as licence itself was invalid* E *and/or tainted with illegality for non-compliance with s 2(2)(b) of the Sarawak Forests Ordinance*

The third respondent had granted the appellant a non-transferrable timber licence over 188,926 hectares in Baram for a period of 25 years from October F 1983. Under s 2(2)(b) of the Sarawak Forests Ordinance ('the Ordinance'), where a company was issued with such a non-transferrable licence, it had to obtain the first respondent's approval to any change in the company's controlling shareholding. After it had obtained the licence, the appellant's controlling shareholding underwent a major change but it did not obtain the G first respondent's approval. On 11 March 1987, the first respondent notified the appellant that its licence had been revoked ('the first revocation'). The appellant challenged the revocation and succeeded in quashing it in the High Court. The High Court's decision caused s 2(2) of the Ordinance to be amended such that, in future, the Minister concerned was required, before H cancelling or suspending any timber licence/permit, to first give the holder thereof notice to show cause why the licence/permit should not be cancelled/suspended. Pursuant to that amendment, the second respondent ('R2'), who was also the Chief Minister, issued a show-cause letter to the appellant in view of the latter's continuing breach of s 2(2)(b) of the Ordinance. I The appellant's request for a right of oral hearing and for arbitration was not considered a satisfactory reply to the show-cause letter and R2 cancelled the

appellant's licence ('the second revocation'). The appellant sued the respondents in the High Court for declaratory reliefs and damages both for breach of contract (ie the alleged wrongful cancellation of the licence) and for the tort of misfeasance in public office. The appellant claimed R2's cancellation of the licence was politically motivated and malicious and hence his action was a misfeasance in public office. The appellant referred to a political attempt ('the Ming Court affair') to unseat R2 as Chief Minister and claimed that, in retaliation, R2 had proceeded to revoke the timber licences of those who had been associated with that attempt and that the appellant's case was one such case. Following a trial, the High Court dismissed the appellant's claims. It held that: (a) the appellant could not maintain any claim for breach of contract for the revocation of the licence because the licence was invalid and/or tainted with illegality for being in breach of s 2(2)(b) of the Ordinance; (b) the appellant had failed to prove the licence was cancelled for a political purpose, hence the tort of misfeasance in public office had not been proven and there was no case for the respondents, particularly R2, to answer; (c) no adverse inference could be invoked against the respondents for not calling R2 to testify; and (d) the appellant's claim in tort was time-barred under the Public Authorities Protection Act 1948 ('the PAPA'). The trial court's decision was upheld by the Court of Appeal ('the COA'). In the instant appeal against the COA's decision, the appellant argued that as it had adduced sufficient evidence to show R2's cancellation of the licence was politically motivated, the courts below were wrong to have held that it had not proven its case on balance of probabilities to require R2 to have testified to refute the various allegations that were made against him. The appellant also contended that limitation did not apply in the instant case because the revocation of the licence was a 'continuing wrong' and also because s 2 of the PAPA did not apply to a tort of misfeasance in public office.

Held, dismissing the appeal:

(1) On the facts of the case, there was no duty on the respondents to have given evidence in their defence. The appellant had not adduced sufficient evidence to prove that the second respondent knew about the Ming Court affair before or at the time he made the decision to revoke the appellant's licence so as to shift the onus of proof to the defence. The respondents did not have a case to answer at the end of the appellant's case. Under the circumstances, the second respondent's failure to give evidence could not give rise to any apparent consequences. On the other hand, there was clear evidence that there was a transfer of the controlling interests in the appellant company without the consent of the Director of Forests and the appellant had clearly breached s 2(2)(b) of the Ordinance (see paras 69, 76 & 80).

(2) The appellant's failure to prove the second respondent's knowledge of the Ming Court affair resulted in its failure, at the end of its case, to prove its pleaded case that the revocation of the licence was done for a political or collateral purpose and that the tort of misfeasance in public office had been committed by the respondents. As such, the evidential burden had not shifted to the defence and there was no duty on the respondents, especially the second respondent, to refute the appellant's allegations by way of oral evidence (see para 77).

(3) This court agreed with the trial judge's finding that the action in respect of the first revocation of the appellant's licence was time-barred under PAPA and that the termination of the licence did not result in any continuing injury to the appellant when it was prevented from entering the licensed area after the High Court quashed the first revocation. This court also agreed with the finding that there was only one act of revocation of the appellant's licence, which act was completed on 11 March 1987; that that act itself did not involve any element of continuance but constituted a complete cause of action and the appellant did not need to wait till the High Court had quashed the first revocation before it commenced its action because what the appellant complained about was the alleged wrongful act which had caused it loss or damage (see paras 85–86).

[Bahasa Malaysia summary

Responden ketiga telah memberikan perayu lesen kayu balak yang tidak boleh dipindah milik ke atas 188,926 hektar di Baram untuk tempoh 25 tahun dari Oktober 1983. Di bawah s 2(2)(b) Ordinan Hutan Sarawak ('Ordinan tersebut'), di mana syarikat dikeluarkan lesen tidak boleh pindah milik, ia perlu mendapat kelulusan responden pertama untuk apa-apa pertukaran dalam pegangan saham majoriti syarikat. Selepas is telah memperoleh lesen itu, pegangan saham majoriti perayu menjalani perubahan besar tetapi ia tidak memperoleh kelulusan responden pertama. Pada 11 Mac 1987, responden pertama telah memberitahu perayu bahawa lesennya telah dibatalkan ('pembatalan pertama'). Perayu telah mencabar pembatalan itu dan berjaya membatalkannya di Mahkamah Tinggi. Keputusan Mahkamah Tinggi menyebabkan s 2(2) Ordinan tersebut dipindah agar, pada masa hadapan, Menteri berkaitan dikehendaki, sebelum membatal atau menggantung mana-mana permit/lesen kayu balak, untuk terlebih dahulu memberikan pemegang notis untuk menunjukkan sebab kenapa lesen/permit itu tidak patut dibatal/digantungkan. Berikutan pindaan tersebut, responden kedua ('R2'), yang juga Ketua Menteri, telah mengeluarkan surat tunjuk sebab kepada perayu mengenai pelanggaran berterusan perayu terhadap s 2(2)(b) Ordinan tersebut. Permohonan perayu untuk hak didengar secara lisan dan

untuk penimbangtaraan tidak dianggap jawapan memuaskan kepada surat tunjuk sebab itu dan R2 telah membatalkan lesen perayu ('pembatalan kedua'). Perayu telah menyaman responden-responden di Mahkamah Tinggi untuk relif-relif deklaratori dan ganti rugi kerana melanggar kontrak (iaitu pembatalan salah lesen yang dikatakan itu) dan untuk tort misfeasans dalam jawatan awam. Perayu mendakwa pembatalan lesen R2 itu bermotifkan politik dan berniat jahat dan justeru tindakannya adalah satu misfeasans dalam jawatan awam. Perayu telah merujuk kepada percubaan politik ('peristiwa Ming Court') untuk menjatuhkan R2 sebagai Ketua Menteri dan mendakwa bahawa, sebagai membalas dendam, R2 telah meneruskan untuk membatalkan lesen-lesen kayu balak mereka yang telah dikaitkan dengan percubaan tersebut dan bahawa kes perayu hanya merupakan satu daripada kes sedemikian. Berikutan perbicaraan, Mahkamah Tinggi telah menolak tuntutan perayu. Ia memutuskan bahawa: (a) perayu tidak boleh mengekalkan apa-apa tuntutan untuk pelanggaran kontrak kerana pembatalan lesen kerana lesen itu tidak sah dan/atau dicemari dengan kesalahan undang-undang kerana melanggar s 2(2)(b) Ordinan tersebut; (b) perayu telah gagal membuktikan lesen itu telah dibatalkan kerana tujuan politif, justeru tort misfeasans dalam jawatan awam tidak dibuktikan dan tiada kes untuk responden-responden, terutamanya R2, untuk jawab; (c) tiada inferens bertentangan boleh dibuat terhadap responden kerana tidak memanggil R2 untuk memberi keterangan; dan (d) tuntutan tort perayu telah luput masa di bawah Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA'). Keputusan mahkamah perbicaraan telah dikekalkan oleh Mahkamah Rayuan ('MR'). Dalam rayuan ini terhadap keputusan MR, perayu berhujah bahawa oleh kerana ia telah mengemukakan keterangan mencukupi untuk menunjukkan pembatalan lesen R2 bermotif politif, mahkamah bawahan terkhilaf untuk memutuskan bahawa ia tidak membuktikan kesnya atas imbangan kebarangkalian untuk menghendaki R2 memberi keterangan bagi menyangkal pelbagai pengataan yang telah dibuat terhadapnya. Perayu juga berhujah bahawa had masa tidak terpakai dalam kes ini kerana pembatalan lesen itu adalah 'continuing wrong' dan juga kerana s 2 APPBA tidak terpakai kepada tort misfeasans dalam jawatan awam.

Diputuskan, menolak rayuan:

(1) Berdasarkan fakta kes, tiada kewajipan ke atas responden-responden untuk memberikan keterangan dalam pembelaan mereka. Perayu tidak mengemukakan keterangan mencukupi untuk membuktikan bahawa responden kedua mengetahui tentang peristiwa Ming Court itu sebelum atau pada masa dia membuat keputusan untuk membatalkan lesen perayu untuk memindahkan beban bukti kepada pembelaan. Responden-responden tidak mempunyai kes untuk menjawab di akhir

kes perayu. Dalam keadaan itu, kegagalan responden kedua untuk memberikan keterangan tidak menimbulkan apa-apa akibat yang jelas. Sebaliknya, terdapat keterangan yang jelas bahawa terdapat pemindahan kepentingan majoriti dalam syarikat perayu tanpa persetujuan Pengarah Perhutanan dan perayu jelas telah melanggar s 2(2)(b) Ordinan tersebut (lihat perenggan 69, 76 & 80).

(2) Kegagalan perayu untuk membuktikan pengetahuan responden kedua tentang peristiwa Ming Court telah menyebabkan kegagalannya, di akhir kesnya, untuk membuktikan kes yang diplinya bahawa pembatalan lesen itu telah dilakukan bagi tujuan politik atau kolateral dan bahawa tort misfeasans dalam jawatan awam telah dilakukan oleh responden-responden. Oleh itu, beban keterangan tidak berpindah kepada pembelaan dan tiada kewajipan ke atas responden-responden, terutamanya responden kedua, untuk menyangkal pengataan perayu melalui keterangan lisan (lihat perenggan 77).

(3) Mahkamah ini bersetuju dengan penemuan hakim perbicaraan bahawa tindakan berkaitan pembatalan pertama lesen perayu telah luput had masa di bawah APPBA dan bahawa penamatan lesen itu tidak mengakibatkan apa-apa kecederaan berterusan kepada perayu apabila ia dihalang daripada memasuki kawasan yang dilesenkan selepas Mahkamah Tinggi membatalkan pembatalan pertama tersebut. Mahkamah ini bersetuju dengan penemuan bahawa terdapat hanya satu tindakan pembatalan lesen perayu, yang mana tindakan itu telah selesai pada 11 Mac 1987; bahawa tindakan itu sendiri tidak melibatkan apa-apa elemen sambungan tetapi merupakan kausa tindakan yang telah selesai dan perayu tidak perlu menunggu sehingga Mahkamah Tinggi membatalkan pembatalan pertama tersebut sebelum ia memulakan tindakannya kerana apa yang diadukan oleh perayu adalah tindakan salah yang dikatakan yang telah menyebabkan ia rugi atau rosak (lihat perenggan 85–86).]

Notes

For a case on conclusion of plaintiff's case, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) para 6701.

Cases referred to

Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors [2011] 5 MLJ 521; [2011] 5 CLJ 481, FC (refd)

Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors [2015] 7 MLJ 763; [2014] 9 CLJ 489, HC (refd)

G Scammell and Nephew, Limited v Hurley and others [1929] 1 KB 419, CA (refd)

Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64 (refd)
Mak Koon Yong & Anor v Municipal Councillors, Malacca [1967] 1 MLJ 256 (refd)
Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301, CA (refd)
Riga Sdn Bhd v Awang Sepian Haji Awang Joini & 3 Ors [2005] MLJU 668; [2005] 1 LNS 251, HC (refd)
Ronald Beadle v Hamzah HM Saman & Ors [2007] 2 MLJ 201, FC (distd)
Sardar Gurbaksh Singh v Gurdial Singh AIR 1927 PC 230, HC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751, FC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (folld)
Three Rivers District Council v Bank of England (No 3) [2000] 2 WLR 1220, HL (refd)
UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)
Wasakah Singh v Bachan Singh [1931] 1 MC 125 (refd)
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur & Anor [2005] 5 MLJ 633; [2005] 7 CLJ 41, HC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103, 106
Federal Constitution art 8, 8(1)
Limitation Ordinance (Cap 49)
Public Authorities Protection Act 1948 s 2, 2(a)
Sarawak Forests Ordinance 1958 (Cap 126) ss 2(2), (2)(b), 51A, 51A(2), (3)

Appeal from: Civil Appeal No Q-01–325 of 2010 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Colin Lau with him) (Michael Ong & Chang Advocates) for the appellant.
JC Fong (Talat Mahmood Abdul Rashid, Lonie Pinda and Beatrice Minda Winston Bala with him) (Sarawak State Attorney General's Chambers) for the respondents.

Hasan Lah FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of

Appeal which affirmed the decision of the High Court. Leave to appeal was granted by this court on 19 August 2014 on the following questions of law:

(a) whether, in a civil case, a trial judge is entitled to make a finding of balance of probabilities against a plaintiff in favour of a defendant who never gave evidence or who has declined to give evidence in his own defence;

(b) whether the elements of the tort of misfeasance in public office as laid down by the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 1220 should be applied by the courts of Malaysia;

(c) whether the mental element of the tort of misfeasance as set out in *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 1220 is sufficiently made out by the execution of a public act for a collateral purpose;

(d) whether the act of revocation of a licence has continuing effect for the purpose of the law of limitation having regard to the decisions in *Mak Koon Yong & Anor v Municipal Councillors, Malacca* [1967] 1 MLJ 256 and *Ronald Beadle v Hamzah HM Saman & Ors* [2007] 2 MLJ 201; and

(e) whether the defence of limitation under the Public Authorities Protection Act 1948 is available to an action in the tort of misfeasance in public office having regard to the decision of the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 1220 and that of the English Court of Appeal in *G Scammell and Nephew, Limited v Hurley and others* [1929] 1 KB 419.

[2] For ease of reference in this judgment the parties will be referred to as they were in the High Court. The appellant was the plaintiff and the respondents were the defendants before the High Court.

BACKGROUND FACTS

[3] The relevant background facts of the case have been set out in details by the learned trial judge and the Court of Appeal and they are as follows. The plaintiff is a private limited company. In 1983, it was granted a timber licence by the third defendant for a period of 25 years from 10 October 1983–9 October 2008 and for an area of 188,926 hectares in Baram.

[4] Among the conditions attached to the licence were these:

(a) cl 15 stated that 'Before any logging contracts are awarded, prior approval should be obtained from the Director of Forests and from the

corporation';

(b) cl 31 stated that 'This licence is not transferrable'; and

(c) the licence incorporated a sixth schedule which formed an agreement between the plaintiff and Sarawak Timber Development Corp or STIDC and cl (xi) of the said schedule provided that the plaintiff shall not allot, issue or register the transfer of any shares of the plaintiff without prior consent of STIDC, which consent shall not be unreasonably withheld.

[5] The shareholders of the plaintiff at the time of the issuance of the licence were Hj Deli Abdul Rahman ('Hj Deli') and Hj Lonis Ali ('Hj Lonis'). On 14 December 1983, both Hj Deli and Hj Lonis transferred all their shareholdings to Solana Sdn Bhd. At the same time, shares in the plaintiff were issued to two others with the following shareholding status in the plaintiff:

Temenggong Baya Malang	...	500 shares
POU (Baram) Sdn Bhd	...	2,500 shares
Solana Sdn Bhd	...	6,998 shares
Total shareholdings	...	9,998 shares

[6] On 5 July 1984 another issuance of shares took place in Solana Sdn Bhd with the result that Lembaga Amanah Kebajikan Miri, Lembaga Amanah Kebajikan Darul-Falah (BINA), Anib Plantations Sdn Bhd, Crista Holdings Sdn Bhd, Polycarp Enterprise Sdn Bhd, Hj Lonis, Hj Deli and Datuk Shahbudin Mat becoming shareholders in Solana Sdn Bhd.

[7] When the above-mentioned transfers of shares in the plaintiff and Solana Sdn Bhd were carried out the plaintiff did not obtain consent from the first defendant as required by s 2(2) of the Sarawak Forests Ordinance 1958 ('the Ordinance').

[8] To regularise the transfers, the plaintiff on 6 September 1985 wrote to the first defendant to obtain his consent for the transfers of shares to Temenggong Baya Malang, POU (Baram) Sdn Bhd and Solana Sdn Bhd. The plaintiff had also on 5 January 1984 wrote to STIDC requesting the same consent. Only on 1 October 1985 the secretary/legal officer of STIDC, one Zakaria Kawi informed the plaintiff that since the allotters were members of the plaintiff before the plaintiff accepted STIDC's letter of offer, STIDC's

consent was not necessary.

[9] Despite the letter from Zakaria Kawi, the board of STIDC had considered the plaintiff's applications for consent and had decided to refer the matter to the second defendant for decision.

[10] On, or about mid 1986, the plaintiff had obtained permits to enter the area to start logging operations and for that purpose the plaintiff had entered into a contract for logging with one Maludan Sdn Bhd on 9 February 1985.

[11] On 11 March 1987, the plaintiff received a one sentence letter from the first defendant informing it that its licence had been cancelled and revoked ('first revocation'). The plaintiff filed a suit in the High Court of Kuching to challenge the revocation. It succeeded and the revocation was quashed by the High Court. On appeal to the Supreme Court against the High Court's decision, the Supreme Court held that the second defendant had failed to abide by the principle of fairness and prudent administration to allow the plaintiff to make representation as to why its licence should not be cancelled.

[12] In view of the decision of the High Court, the Sarawak Legislative Assembly amended s 2(2) of the Ordinance and added a new s 51A therein which became effective on 1 January 1988. Subsection (2) of s 51A reads:

> (2) The Minister shall before cancelling or suspending any licence or permit under subs (1), give the holder of the licence or permit notice in writing of his intention to do so and calling upon the person concerned to show cause to him why such licence or permit should not be cancelled or suspended, as the case may be.

[13] On 4 April 1988, the second defendant through the permanent secretary and following the procedure laid down in s 51A of the Ordinance wrote to the plaintiff seeking an explanation as to why its licence should not be revoked in view of the continuing breaches of s 2(2)(b) of the Ordinance. The plaintiff on 3 May 1988 replied and requested for the right of oral hearing and arbitration as provided under the licence.

[14] The second defendant was not satisfied with the plaintiff's explanation and accordingly cancelled the licence ('second revocation').

[15] Though the plaintiff was accorded the right of appeal to the Majlis Mesyuarat Kerajaan Negeri under s 51A(3) of the Ordinance against the second revocation, it did not do so as it was of the opinion that there would not be a fair hearing as the second revocation was politically motivated and done in

bad faith. It was the case for the plaintiff that the second revocation of the licence by the second defendant was motivated by malice and his action amounted to misfeasance in public office. The plaintiff further contended that s 51A of the Ordinance was unconstitutional as it contravened art 8 of the Federal Constitution.

[16] Subsequent to the second revocation, the licensed area of the licence was divided into four parts and licences were issued to three other companies including PPES Resorts Sdn Bhd which is a company owned by the Sarawak Economic Development Corp ('SEDC').

[17] The plaintiff then brought a suit for a declaratory relief and for damages as regards both the first and second revocations. It based its claim both in contract and in the tort of misfeasance of public office. After a trial at which oral and documentary evidence was led, the High Court found against the plaintiff on all issues. The plaintiff then appealed to the Court of Appeal. The appeal was heard and dismissed on 5 March 2013.

DECISION OF THE HIGH COURT

[18] In his judgment the learned trial judge listed out five main issues for determination by the court. They are as follows:

(1) whether the plaintiff's claim in respect of the first revocation is statute-barred by reason of the Public Authorities Protection Act 1948 ('the PAPA') and/or the provisions of the Sarawak Limitation Ordinance?

(2.1) whether there had been breach or contravention of s 2(2) of the Ordinance by the plaintiff in having allowed its controlling shares to be transferred without authorisation of the Director of Forests or a person authorised by him in that behalf?

(2.2) if there was such breach, whether the licence was rendered invalid and/or tainted with illegality?

(3.1) whether the first and second revocation were unlawful or contrary to law and should be set aside?

(3.2) was the revocation of the plaintiff's timber licence done to serve a political purpose?

(4) whether s 51A of the Ordinance (as amended) is ultra vires art 8(1) of the Federal Constitution? and

(5) if the court finds in favour of the plaintiff's claim for compensation, damage or loss, what is the quantum thereof?

[19] With regard to the first issue, the learned trial judge found that the plaintiff's claim in tort on the first revocation was time-barred. On the second issue the learned trial judge held that the plaintiff was in breach of s 2(2) of the Ordinance when it allowed its controlling shares to be transferred without the authorisation of the first defendant and accordingly the licence was tainted with illegality. The plaintiff's claims and cause of action for breach of contract or breaches of the licence could not be maintained.

[20] On the third issue, the learned trial judge answered that in the negative. On the facts of the case the learned trial judge held that the revocation of the licence did not amount to misfeasance in public office. It was also held that the termination of the plaintiff's licence was not done for a political purpose.

[21] The learned trial judge found it unnecessary to address the fourth and the fifth issue.

DECISION OF COURT OF APPEAL

[22] As regards whether the plaintiff's claim in respect of the first revocation was statute-barred by reason of the PAPA and/or the provisions of the Sarawak Limitation Ordinance, the Court of Appeal observed that the plaintiff's cause of action concerned the second defendant's alleged tort of misfeasance in public office and also an action for the breach of contract in terminating the licence without the requisite three months notice. The date of the revocation was 11 March 1987 and the date of the filing of this suit was 31 July 1990.

[23] The Court of Appeal agreed with the finding of the High Court that the plaintiff's claim in tort for the first revocation was time-barred and as for the cause of action on contract, the plaintiff had breached the Ordinance because the shares were transferred without the authorisation of the first defendant.

[24] On the allegation of a general plan and oral agreement by the plaintiff through Tun Abdul Rahman ('PW9') and the plaintiff's contention that the learned trial judge failed to appreciate that the defendants' case suffered a fatal flaw in not calling the second defendant as a witness to rebut the evidence of the plaintiff's witnesses, the Court of Appeal agreed with the finding of facts that at best the general plan was a personal initiative of PW9 to which the third defendant was not a party. The Court of Appeal further agreed with the finding

of the learned trial judge that even if there was a general plan, the plaintiff still had to comply with the legal requirement in s 2(2) of the Ordinance.

[25] The Court of Appeal agreed with the learned trial judge that the licence was rendered invalid and tainted with illegality because of the breach of s 2(2) of the Ordinance by the plaintiff. The Court of Appeal opined that public policy dictates that the plaintiff cannot bring its action based on a licence tainted with illegality.

[26] With regard to the issue of whether the first and second revocations were lawful or contrary to law the plaintiff raised the following factors:

(a) there was no oral hearing conducted prior to the second revocation;

(b) the decision was irrational and unreasonable in the circumstances;

(c) the decision is disproportionate or offended the principle of fairness; and

(d) the decision was motivated by malice which amounted to public misfeasance.

[27] The Court of Appeal observed that the learned trial judge had applied the principle of law to the factual matrix correctly and found no error in the trial judge's grounds. Further, it was observed that they were all findings of fact by the trial judge and the Court of Appeal did not find any appealable error from his grounds.

[28] The final issue considered by the Court of Appeal was whether the revocation of the plaintiff's timber licence was done to serve a political purpose? The Court of Appeal, after having considered the trial judge's grounds, agreed with the trial judge's decision not to accept the plaintiff's contention. The Court of Appeal agreed with the findings of the trial judge that there was no direct evidence in court to show that the first and the second defendant knew about the Ming Court affair meeting prior to the cancellation of the plaintiff's licence and to link the aforesaid cancellation to a political motive was a mere conjecture.

SUBMISSIONS OF THE PLAINTIFF

[29] The submissions on the issues relating to the first three questions are interrelated and can be dealt with together.

[30] It was submitted that in the present case the evidence adduced by the

plaintiff at the end of the plaintiff's case was sufficient in law to establish the tort of misfeasance in public office and that the second defendant cancelled the plaintiff's licence in bad faith, that is to say, he did it for an improper or ulterior motive.

[31] Malice, which is the ingredient the plaintiff is relying upon, is a state of mind. The plaintiff must rely on circumstantial evidence to prove this element. It was submitted that the correct question to be asked at the close of the plaintiff's case is whether a prima facie inference of malice may fairly be drawn from the evidence gathered at that stage.

[32] It was submitted that the plaintiff had led evidence which prima facie showed that the Ming Court affair existed and that the plaintiff's licence was cancelled because of PW9's participation in support for the Ming Court affair.

[33] In the plaintiff's written summary of argument on questions 1, 2 and 3, dated 1 August 2016, the plaintiff set out 14 circumstantial evidence in the case from which, it was submitted, a prima facie inference of malice may be drawn against the second defendant.

[34] It was further submitted that in assessing the evidence at that stage, the court must for the purpose of deciding whether a prima case has been made out accept the evidence given on behalf of the plaintiff as true. In support of that contention learned counsel cited the case of *Wasakah Singh v Bachan Singh* [1931] 1 MC 125.

[35] It was therefore submitted that both the High Court and the Court of Appeal erred in their decisions when they required the plaintiff to prove its case on a balance of probabilities against the second defendant at the close of its case.

[36] It was submitted that it was incumbent for the second defendant to have given evidence in respect of both the knowledge of the plan and the reason for revocation as he was a party to the suit against whom an allegation of knowledge had been levelled and specific allegations of malice were made. In support of that proposition learned counsel for the plaintiff cited the Indian case of *Sardar Gurbaksh Singh v Gurdial Singh* AIR 1927 PC 230 at pp 233–234. It was further submitted that it is fair to infer that had the second defendant given evidence, his testimony would have favoured the plaintiff.

[37] With regard to the issue of limitation, learned counsel for the plaintiff submitted that it does not apply for two reasons. First, because the act of revocation was a continuing wrong. It was submitted that the correct approach

is to look at the consequences of the wrong done. If the injury or harm consequent upon the wrongful act is a continuing one then a statute of limitation will not apply.

[38] Secondly, it was submitted that s 2 of the PAPA does not apply to a tort of misfeasance in public office. In support of the argument learned counsel relied on the case of *G Scammell and Nephew, Limited v Hurley and others* [1929] 1 KB 419 at p 427.

SUBMISSIONS OF THE DEFENDANTS

[39] Learned counsel for the defendants submitted that the questions of law in this appeal are not supported or underpinned by facts found concurrently by both the High Court and Court of Appeal that there was a breach or contravention of s 2(2) of the Ordinance by the plaintiff by allowing its controlling shares to be transferred without authorisation of the Director of Forests or a person authorised by him in that behalf.

[40] It was submitted that the issues in the appeal are mainly on findings of facts by the learned trial judge which were affirmed by the Court of Appeal. In such circumstances, the Federal Court, in the exercise of its appellate jurisdiction, should not disturb the concurrent findings of facts or to draw its own inferences from such facts.

[41] With regard to the first question it was submitted that on the facts of the case both the High Court and the Court of Appeal have found as a fact that the plaintiff had not adduced sufficient evidence to shift the burden of proof to the defendants. Having regard to the plaintiff's own evidence from PW9, it is insufficient to prove the crucial ingredient of the tort that the second defendant's decision to cancel the licence was to serve a political purpose.

[42] It was submitted that on the evidence adduced by the plaintiff the courts below were correct to hold that the plaintiff had failed to adduce evidence, if believed, is sufficient to prove its case and therefore the second defendant had no case to answer.

[43] Learned counsel for the defendants contended that the plaintiff's pleadings did not allege that the second defendant had any knowledge of the 'oral agreement' or 'general plan'. According to learned counsel, under s 106 of the Evidence Act 1950 ('the EA') the burden of proving any fact which is especially within the knowledge of that person is upon him. This question involved the legal principles governing the burden of proof and onus of proof and ss 101, 102 and 103 of the EA.

[44] It was submitted that the burden of proof rests throughout the trial on the party on whom the burden lies. The onus of proof relates to the responsibility of adducing evidence to discharge that burden of proof. This burden shifts constantly during the trial from one side to the other according to the scale of evidence or other preponderance. When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party upon whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself.

[45] It was submitted that the learned trial judge had ruled that the evidential burden had not shifted on the defendants to call the second defendant to testify on the matter referred to by the plaintiff, namely the onus of proving misfeasance in public office had not shifted to the defence. As such the principle of law enunciated by Elphinstone CJ in *Wasakah Singh* and applied in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751 by the Federal Court does not apply to the facts and circumstances of this case.

[46] In the alternative it was submitted that even if the onus of proof had shifted to the defence, the defence had called nine witnesses whose evidence had been accepted by the trial court in answer to the allegations made against the defence in regard to the revocation of the licence and therefore no adverse inference should be drawn against the second defendant for not giving evidence. In addition, there was a clear concession and admission by the plaintiff that there was transfer of controlling shares in the plaintiff company without consent of the Director of Forests and the consequential finding of the trial judge that there was a contravention of s 2(2) of the Ordinance.

[47] As regards the second question, it was submitted that the principles in *Three Rivers District Council v Bank of England (No 3)* have been consistently applied by the Malaysian courts. On the evidence available the learned trial judge found that there was no evidence of targeted malice behind that decision to revoke the licence.

[48] As regards the third question, it was submitted that there was no factual basis to support this question as the learned trial judge found that the plaintiff had contravened s 2(2) of the Ordinance and when the second defendant revoked the licence he was not aware of the Ming Court affair.

[49] As regards the fourth and fifth questions which relate to the issue of limitation it was submitted that this issue only applies to the first revocation which was made on 11 March 1987. However the action was commenced by the plaintiff on 31 July 1990, which is more than three years after the revocation. It was submitted that the limitation period under s 2(a) of the

PAPA is absolute and the period of limitation runs from the date of revocation of the licence and the issue of 'continuance of the injury' has no application to the facts of this case.

[50] It was also submitted that any tort which involved 'a mental element' is not excluded by the provision of s 2(a) of the PAPA. Furthermore, in the instant case the plaintiff failed to prove the tort of misfeasance against the defendants.

DECISIONS OF THIS COURT

[51] On the issue of whether the questions as framed are academic we take note of the fact that this issue was raised at the leave stage and was rejected by this court. In dealing with this issue we agree with the observation made by this court in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25 at p 49; [2011] 1 CLJ 51 at pp 80–81.

> [41] So in my view, once leave is granted the appellate panel should not again consider whether leave should or should not have been given unless that leave was erroneously granted because certain established law or statute which would lead the court hearing the appeal to dismiss the appeal in limine was not brought to the attention or overlooked by the leave panel. Also, to use the word of Abdul Hamid Mohamad JCA in *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513, 'It is res judicata'. The appellate panel should respect the leave panel and just proceed to hear the appeal, even if the appeal is groundless. More often than not no reasons are given at leave stage.

[52] In order to deal with the first question it is necessary to reproduce the relevant part of the judgment of this court in *Takako Sakao* which can be found in paras 4–6 of the judgment and they are as follows:

> [4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 at p 128:
>
> > If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non- direction amounting to a misdirection which occasioned a miscarriage of justice. The trial

judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: 'The Respondents had chosen to close the case at the end of the appellant's case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it'. There are two other authorities that are of assistance on the point. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Brooke LJ then went on to say this:

From this line of authority I derive the following principles in the context of the present case:

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

The other case is *Crawford v Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the advice of the Privy Council said:

> It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

Sarkar on Evidence (16th Ed) at p 1837 states:

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross- examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v Gurdial* AIR 1927 PC 230.

[6] In the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice. To conclude the first issue, it is our judgment that there was no judicial appreciation of the appellant's evidence. A reasonable tribunal correctly directing itself on the facts and the relevant law would have held that the appellant had indeed contributed RM194,610 towards the purchase price of the building that there was a mutual understanding between the appellant and the first respondent that they shall be beneficial co-owners of the property in question in equal shares; and that the first respondent had acted in breach of that understanding.

[53] In *Takako Sakao*, the appellant and the first respondent were partners in the business of a restaurant. Sometimes in 1992, they decided to acquire the building in which the restaurant had its business. Each of them was to contribute towards the purchase price. The appellant paid a sum of money as her contribution towards the price. The first respondent purchased the property in question on 6 March 1992, for a sum of RM950,000 and had it

registered in her sole name. In mid-1996 the first respondent sold the property to the second respondent.

[54] The appellant then instituted proceedings to enforce the trust she claimed had arisen in her favour. The first respondent did not attend court nor give evidence nor take any part in the case. All she did was merely to put forward arguments on why the appellant's caveat ought to be removed.

[55] In the instant case, the second defendant also did not give evidence even though specific allegations were made against him. However, the defence had called nine witnesses whose evidence had been accepted by the trial court in answer to the allegations made against the defence in regard to the revocation of the licence. It was also established at the close of the plaintiff case that there was a transfer of controlling shares in the plaintiff company which was in contravention of s 2(2) of the Ordinance.

[56] In dealing with this issue, the learned trial judge in the instant case had this to say:

> In coming to the above finding I have not overlooked the submission of the plaintiff that the Minister of Resource Planning/Chief Minister is a party having personal knowledge of the material facts in dispute and therefore the Minister should have been called to give his evidence failing which the court should draw an adverse inference against the defendants. Thus it was alleged by the plaintiff that the Minister knew the existence of the general plan, that he knew that Tun Abdul Rahman had an oral agreement and understanding with Datuk Nor Tahir regarding the general plan, that the Minister knew the ultimate beneficiaries of the plaintiff's licence, that Datuk Nor Tahir as Chairman of the Board to refer the plaintiff's application for share transfer to the Minister. In support of its contention that the court should draw an adverse inference in the circumstances where the Minister did not come to give evidence, the plaintiff referred me to the decision of the Federal Court in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751.
>
> I accept, as I am bound to, what was held by the Federal Court in *Takako Sakao*'s case, but with all respect I find that decision of no assistance to the plaintiff here, because I do not find that the evidential burden has shifted on the defendants to call the Minister to testify on the matters referred to as the plaintiff has been unable to prove on a balance of probabilities a case for the Minister to answer in respect of each of the matters the Minister is alleged to have personal knowledge about as I have already made findings that there is no evidence produced by the plaintiff to show that the Minister in fact knew or had knowledge about them. Accordingly it is not appropriate on the facts of this case to draw an adverse inference against the defendants for not calling the Minister to testify.

[57] On the same issue, the Court of Appeal made the following observation:

> [36] The Federal Court in view of the lack of evidence to rebut the appellant's evidence held that Judgment should have been given to the appellant. The Federal

> Court in coming to its decision relied on the case of *Wasakah Singh v Bachan Singh* [1931] 1 MC 125 and quoted with approval the dicta of Elphinstone CJ. If one looks at that quotation carefully, the learned Chief Justice talks of evidence which 'if it is believed'. What we take that to mean is simply the evidence of the appellant must reached a level that is to be believed. If the evidence of the appellant through cross examination by the respondent's counsel is devalued so to speak or not reached a level to be believed, then the trial judge is entitled to conclude that the appellant had not proved its case requiring the respondents to rebut. The burden of proof had not shifted at the end of the appellant's case at trial. That is what happened in the trial court here. The learned judge actually was very mindful of the principle of *Takako* case ...

[58] As stated in *Takako Sakao* two consequences followed when a party who was fully conversant with the facts studiously refrained from giving evidence. The first is that the evidence given by the other party ought to have been presumed to be true. The second consequence is that the court ought to have drawn an adverse inference against a party who has a case to answer but did not care to give evidence on the issue in the action.

[59] It is undisputed that the plaintiff's stand was that the decision to revoke the licence by the second defendant was politically motivated. To prove its case the plaintiff relied mainly on the evidence of PW9 who testified that he had briefed the second defendant on the general plan when the second defendant succeeded him as the Chief Minister. The implementation of the general plan was left to Datuk Nor Tahir and several others. The plaintiff was part of the general plan. The licence was issued to the plaintiff on 19 July 1983 for a period of 25 years and it covered an area of 188,926 hectares in Baram.

[60] According to PW9, the second defendant held him responsible for the Ming Court affair. For that reason, the second defendant proceeded to act against companies connected with PW9 to cancel their timber licences. The plaintiff was one of such company.

[61] To give credence to the evidence of PW9 on the general plan, Datuk Kamal Hussain ('PW4') and Norlia Abdul Rahman (PW5) testified in court. PW4 related the instructions given by PW9 to him in the presence of Datuk Nor Tahir to provide names of three companies for the issuance of the timber licence.

[62] PW5 testified that in order to implement the general plan as devised by PW9 she prepared and issued the circular resolutions of the plaintiff dated 14 December 1983 to transfer Datuk Deli's and Hj Louise Ali's shares to Solana Sdn Bhd and allot the controlling shares in the plaintiff to three parties.

[63] The learned trial judge, after minutely examining the evidence of the plaintiff's witnesses, found that at best the general plan was a personal initiative of PW9 to which the government was not a party. He provided seven broad grounds for his conclusion which has been summarised by the Court of Appeal as follows:

(a) failure on the part of the appellant to plead this 'general plan' in its pleadings at its earliest opportunity;

(b) the evidence shows that the conduct of the then Minister of Forest as chairman of STIDC is inconsistent to the existence of this general plan;

(c) the evidence of Haji Deli is inconsistent to the existence of the general plan;

(d) Solana Sdn Bhd the biggest shareholder in the appellant was not in existence when the Licence was issued in 19 July 1983; and

(e) despite the fact that Tun Abdul Rahman was the Chief Minister from 7 July 1970–26 March 1981, there is no evidence to show that he had issued any licence that was to implement the general plan during his tenure which he could have easily done.

[64] The learned trial judge further held that even if there was a general plan, the plaintiff still had to comply with the legal requirement of s 2(2) of the Ordinance and there was non-compliance to that provision and the licence was rendered invalid and/or tainted with illegality.

[65] On the issue of whether there was misfeasance in public office, the learned trial judge found that the plaintiff failed to prove this tort against the first and second defendants. His reasons for such finding can be found in his grounds of judgment. Among the reasons are:

(a) since August 1985, which was two years before the first revocation, the second defendant had already directed his mind to dealing with a serious problem about the prevalence of timber licensees selling their shares in companies issued with timber licences;

(b) there were evidence that the plaintiff had contravened s 2(2) of the Ordinance;

(c) the decision to revoke the plaintiff's licence along with that of some of other licences was made at a meeting where the Chief Minister, the State Attorney-General, Director of Forests (DW7) and Hj Abdillah (DW9) were present. The meeting was arranged by Datuk Dr Yusoff (DW6) and it was his evidence that the meeting was held to discuss not just one cancellation but to discuss the cancellation of timber licences in violation of s 2(2) of the Ordinance; and

(d) from PW8 and PW9 own evidence the Chief Minister did not know about the Ming Court affair at the time the decision to revoke the plaintiff's licence was made.

[66] On the issue of whether the revocation of the plaintiff's timber licence was done to serve a political purpose, the issue has to be considered in the light of Ming Court affair and the manner in which the licence was cancelled.

[67] The Ming Court affair concerned a move to get 28 state assemblymen to cross the floor of the state assembly in an attempt to remove the second defendant as the Chief Minister. A press conference by the group of politician opposed to the Chief Minister was held on 9 March 1987. On 10 March 1987, there was a press report which carried the headline 'Taib lashes out at 'wealth for power' attempts to destabilize and grab power'. On the same day, there was a meeting between the Chief Minister, Datuk Leo Chai (DW7), Hj Abdillah (DW9) and the then state attorney general to discuss the termination of timber licences. On 11 March 1987, there was another press report quoting the Chief Minister as saying he was watching the use of timber money to destabilise the state government. It was against this backdrop that on 11 March 1987 the plaintiff's licence together with 25 other licences were revoked. Hence, it was the contention of the plaintiff that the revocation of the plaintiff's timber licence was done for political purpose and done hurriedly.

[68] The learned trial judge did not accept the plaintiff's argument. The learned trial judge gave several reasons for his finding on this issue which can be summarised as follows:

(a) not all timber licences of those who opposed the government were revoked;

(b) based on the evidence the Chief Minister did not know about the Ming Court affair until earliest on 1 March 1987;

(c) there was a breach of s 2(2) of the Ordinance by the plaintiff;

(d) as early as when the Chief Minister took over the forestry portfolio from Datuk Nor Tahir on 12 July 1985, the Chief Minister was briefed by the Director of Forests about the prevalence of timber licensees transferring their licences through the sale of shares in the companies issued with timber licences and that this was a serious problem which resulted in the Chief Minister issuing the directive that there should not be a transfer of shares or change in contractors without reference to the Minister. In the learned trial judge's opinion, the termination of 26 timber licences can be seen as a reflection of the extent and seriousness of the problem faced by the Director of Forests regarding transfer of shares and change of contractors; and

(e) there is evidence of investigation on shareholdings and other details of timber companies which were carried out in January and February 1987 by Datuk Leo Chai (DW7) and Hj Abdillah (DW9). According to the learned trial judge this evidence shows that the revocation of the plaintiff's licence was neither hurried nor without proper investigation as alleged.

[69] Both the High Court and the Court of Appeal made a concurrent finding of facts that the plaintiff had not, at the end of its case, discharged its burden of proof in respect of its allegations that there was misfeasance in public office and the revocation of its licence was done to serve a political purpose. In other words the evidential burden had not shifted to the defendants. As such the defendants did not have a case to answer at the end of the plaintiff's case. Under the circumstances the failure of the second defendant to give evidence could not give rise to any apparent consequences.

[70] In order for the plaintiff to succeed in its case that the cancellation of its licence was to serve a political purpose, it is necessary for the plaintiff to adduce evidence if believed, sufficient to prove that the second defendant knew about the Ming Court affair prior to the cancellation of the plaintiff's licence. Both the High Court and the Court of Appeal found that the plaintiff had not adduced direct evidence to show that the second defendant knew about it. It was also the finding of the courts below that to link the aforesaid cancellation to a political motive is a mere conjecture.

[71] The learned trial judge accepted the evidence of PW8 (Datuk Salleh Jaffaruddin) who was one of the key men involved in the Ming Court affair that the Ming Court affair was not made known to the second defendant. PW8 also went on to say in his cross-examination that on 11 March 1987 news of the Ming Court affair had not been published or confirmed.

[72] The plaintiff relied on the evidence of PW9 and several reports in the local newspapers to show that the second defendant knew about the Ming Court affair and the cancellation of its licence was done on political ground. However, PW9 merely alleged the cancellations was taken on political ground (see his witness statement dated 19 September 2004 at pp 3793–3794 of the appeal record). To support PW9's allegation, the plaintiff adduced documentary evidence in the form of the newspaper reports of the statements allegedly made by the second defendant to the press relating to the cancellation of the timber licences to prevent timber money from being used against the government.

[73] The following newspaper reports were adduced in the trial by the plaintiff to prove its allegation that the second defendant knew about the Ming Court affair and the licence was revoked on political ground:

(a) *People's Mirror* dated 10 March 1987 headed 'Taib lashes out at 'wealth for power' attempts' (exh P260) and captioned 'BIG SHOT'S TIMBER LICENCE REVOKED' (exh P128);

(b) *Borneo Post* dated 11 March 1987 captioned 'The timber connection' (exh P77);

(c) *Star* newspaper dated 11 March 1987 captioned 'REVOLT AGAINST TAIB' (exh P252);

(d) *People's Mirror* dated 14 April 1987 captioned 'Orang Ulu folk assured of share' (exh P268); and

(e) *People's Mirror* dated 10 April 1987 captioned 'Taib makes his stand on timber money' (exh P125).

[74] Learned counsel for the defendants contended that the newspaper reports are not admissible as their authors were not called to testify. In support of that contention learned counsel cited the case of *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Jaafar v Datuk Bandar Kuala Lumpur & Anor* [2005] 5 MLJ 633; [2005] 7 CLJ 41.

[75] We agree with the submission of learned counsel for the defendants that the newspaper reports are inadmissible as the authors of the report were not called to testify. The truth or otherwise of their contents were not proven. It is well established that inadmissible evidence does not become admissible by reason of a failure to object (see *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64). Without the press reports there is no evidence to prove that the second defendant knew about the Ming Court affair and the cancellation of the plaintiff's licence was done for a collateral or political purpose.

[76] Based on the evidence before the court, we agree with the High Court that the plaintiff had not adduced sufficient evidence to prove that the second defendant knew about the Ming Court affair before or at the time he made the decision to revoke the plaintiff's licences so as to shift the onus of proof to the defence. On the other hand, there was clear evidence that there was a transfer of controlling interests in the plaintiff company without the consent of the Director of Forests and the plaintiff had clearly breached s 2(2)(b) of the Ordinance.

[77] The plaintiff's allegation that the revocation of its licence was done for a political or collateral purpose and the defendants had committed the tort of misfeasance in public office could only be proven if it was proved that the

second defendant was aware of the Ming Court affair at the time the decision was made to revoke the plaintiff's licence. The plaintiff's failure to prove the second defendant's knowledge of the Ming Court affair had resulted in its failure to prove its pleaded case that the revocation of the licence was done for a political or collateral purpose and the tort of misfeasance in public office against the defendants at the end of its case and as such the evidential burden had not been shifted to the defence. As such there was no duty on the defendants, especially the second defendant, to refute the plaintiff's allegation by way of oral evidence.

[78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party (see *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4). When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. See *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697.

[79] The findings made by the learned trial judge are mainly findings of facts and he gave credible reasons for his findings. He had the benefit of hearing testimonies and observing the demeanour of the witnesses. Those findings of facts were affirmed by the Court of Appeal. It would need very clear and convincing reasoning to justify us to reverse what has already been decided. We have looked at those findings of facts by the learned trial judge and the detail reasons given by him and we are satisfied that, on the facts of the case, any reasonable tribunal would have made similar findings.

[80] We find it unnecessary to answer the first question of law posed in this appeal because on the facts of this case there was no duty on the defendants to give evidence in their defence.

[81] As regards the second question, it is clear from the submission of the parties that the principles of law enumerated in *Three Rivers District Council* have been accepted and applied by the Malaysian courts. See the case of *Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763; [2014] 9 CLJ 489, *Riga Sdn Bhd v Awang Sepian Haji Awang Joini & 3 Ors* [2005] MLJU 668; [2005] 1 LNS 251, *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301.

[82] Under the circumstances we find it unnecessary to answer the second question.

[83] As regards the third question posed in this appeal, we also find it unnecessary to answer it as it has not been proved that the revocation of the plaintiff's licence was done for a collateral purpose. To answer a legal question not related to the facts of the case would be an academic exercise (see *Blue Valley Plantation Bhd v Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521; [2011] 5 CLJ 481).

[84] We will now deal with the fourth question of law. On the issue of limitation, the relevant provision is s 2(a) of the PAPA and it, inter alia, provides that any suit against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority shall not lie or be instituted unless it is commenced within 36 months next after the act, or in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof.

[85] The learned trial judge held that the action in respect of the first revocation of the plaintiff's licence was time-barred as it was filed three years four months and 20 days after the revocation, which was outside the 36 months period. The trial judge did not accept the plaintiff's contention that the termination of the licence resulted in a continuing injury to the plaintiff when the plaintiff was prevented from entering the licensed area after the High Court quashed the first revocation. The learned trial judge held that there was only one act of revocation of the plaintiff's licence which act was completed on 11 March 1987. That act itself did not involve any element of continuance. It constituted a complete cause of action and the plaintiff did not need to wait till the High Court quashed the revocation before it commenced its action because what the plaintiff complained about was the alleged wrongful act which caused the loss or damage to it. The learned trial judge also held that the facts in *Ronald Beadle v Hamzah HM Saman & Ors* can be distinguished.

[86] We agree with the finding of the learned trial judge on this issue and we do not find any merit in the plaintiff's argument on this issue. For the reasons given we answer the fourth question of law in the negative.

[87] We find it unnecessary to answer the fifth question as the plaintiff failed to prove the tort of misfeasance in public office against the defendants.

[88] We accordingly dismiss the appeal with costs.

A *Appeal dismissed.*

Reported by Ashok Kumar

B

C

D

E

F

G

H

I